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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re the Marriage of JOLENE and GARY M. WINSTON.	
JOLENE WINSTON, Respondent, v. GARY M. WINSTON, Appellant.	A122365 (Marin County Super. Ct. No. FL-062557)

In this marriage dissolution case, the trial court found that a document signed by respondent Jolene Winston purported to transmute community property to separate property, and that the agreement was invalid because it did not comply with Family Code section 852.[1] On appeal, appellant Gary M. Winston contends these findings were erroneous and require reversal. We affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The parties were married in 1988 and separated in 2006. Respondent filed a petition for dissolution of marriage on June 13, 2006.

On September 14, 2006, appellant filed his response. Among other things, he requested that "All assets and liabilities to be confirmed to the party entitled thereto as specified in the parties [*sic*] August 8, 1997 Postnuptial Agreement" (The Agreement).

[1] All subsequent statutory references are to the Family Code.

On June 9, 2008, appellant filed his trial brief on the bifurcated issue of the validity of the Agreement. Within his brief, he stated: "The parties were each represented by independent counsel. The Agreement was valid as to form. The terms are not unconscionable. *In fact, the then community estate was divided equally between the parties*." (Italics added.)

Respondent served her trial brief on June 9, 2008. Within her brief she argued the Agreement is unenforceable because it purports to transmute community property to separate property without meeting the requirements of section 852, subdivision (a).[2]

On June 11, 2008, appellant served a motion in limine asking the trial court to decide as a matter of law whether the Agreement was a transmutation agreement and, if so, whether the agreement was valid.

On June 13, 2008, respondent served her response to appellant's motion.

The hearing was held on June 13, 2008. After hearing the parties' arguments, the trial court concluded the Agreement is a transmutation agreement that does not meet the requirements of section 852.

On July 9, 2008, respondent submitted a proposed statement of decision. Appellant filed objections to the statement of decision on July 25, 2008. These objections were overruled.

On August 8, 2008, the trial court filed its statement of decision. The court stated the Agreement "clearly is a transmutation agreement." The court further stated the Agreement failed to satisfy section 852, subdivision (a)'s "express declaration" requirement. In the accompanying judgment, the court held that the Agreement is unenforceable under section 852. Pursuant to California Rules of Court, rule 5.180(b)(1), the court certified that there was probable cause for immediate appellate review of the issue of the agreement's validity.

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[2] Section 852, subdivision (a), provides: "A transmutation of real or personal property is not valid unless made in writing by an express declaration that is made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected."

On September 23, 2008, we granted appellant's motion for leave to appeal a bifurcated family law judgment.

DISCUSSION

I. The Agreement

While the Agreement is entitled "Postnuptial Property Agreement," it actually reads more like an agreement made in contemplation of marriage, instead of an agreement between spouses who had already been married for nine years. For example, one of the stated goals of the agreement is "to *maintain* and *preserve* the *separate character* of the property *now owned* by Gary [described in attached Schedule A][3] and the property *now owned* by Jolene [described in attached Schedule B]."[4] (Italics added.) Another goal is "to establish that all increases in such separate property and money and property received or acquired by either party *after their marriage* on account of such separate property *shall continue* to be separate property as if each party were unmarried." (Italics added.) The agreement goes on further to state: "NOW THEREFORE, *in consideration of the promise of marriage heretofore made* by each of the parties to the other, and of the mutual covenants and agreements below set forth Gary and Jolene agree as follows . . . ." (Italics added.)

Among the Agreement's provisions is one by which respondent "agrees that the property described in Schedule A . . . is the separate property of [appellant]; that all increases in such separate property and money and property received or acquired by [appellant] after their marriage on account of such separate property shall continue to be separate property of [appellant] as if [he] was unmarried; and [respondent] hereby waives and releases any and all community property rights in such separate property and the

[3] Schedule A includes 1,000 shares of Winston & Co. Accountancy Corporation, 5,000 shares in various stock holdings, a bank account, a 1995 Land Rover, and 50,000 shares of Marin Tug & Barge.

[4] Schedule B includes a promissory note from appellant for 50 percent of Winston & Co. Accountancy Corporation, an IRA account, four bank accounts, a 1993 Acura Legend, a residence in San Rafael, and a promissory note from appellant "for money" for Marin Tug & Barge.

proceeds of investment and reinvestment of such property shall likewise be separate property."

Another provision states: "Each of the parties *waives and releases any and all community property rights* and agrees that all amounts earned from personal services as salary, self-employment income or otherwise by either party during the marriage shall be the separate property of that party, free from any community interest or claim of the other property [*sic*] and the proceeds of investment and reinvestment of such property shall likewise be separate property. . . . *There shall be no community property between the parties*, absent a contrary agreement made in accordance with paragraph 12."[5] (Italics added.)

II. Was The Agreement A Transmutation Agreement?

Appellant contends the Agreement is not a transmutation agreement. We disagree.

"Transmutation" is an interspousal transaction or agreement which changes the character of marital property. (*In re Marriage of Haines* (1995) 33 Cal.App.4th 277, 293.) The law allows spouses to transmute their community property to the separate property of each spouse. (§ 850, subd. (a).) To be valid, however, a transmutation must be "made in writing by an express declaration that is made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected." (§ 852, subd. (a).) "In deciding whether a transmutation has occurred, we interpret the written instruments independently, without resort to extrinsic evidence. [Citations.] Under the circumstances, we are not bound by the interpretation given to the written instruments by the trial court." (*In re Marriage of Starkman* (2005) 129 Cal.App.4th 659, 664 (*Starkman*).) We exercise our independent judgment and conclude that the Agreement purports to establish a transmutation of community property into separate property.

In determining the community or separate nature of property, the applicable statutory scheme starts from the premise that all property acquired during the marriage is

[5] Curiously, the document contains only eight paragraphs. There is no "paragraph 12."

community property. (§ 760.) Accordingly, given that the parties were married for nine years before the Agreement was conceived, we presume the property addressed therein belonged to the community. As noted above, the Agreement purports to divide the parties' assets into two separate shares. Nothing in the Agreement establishes that the assets acquired during the parties' marriage were acquired with separate property funds. The Agreement states the parties agree that the assets listed in Schedule A and Schedule B are the separate property of each spouse, but it does not reveal the means by which they accumulated these postnuptial assets. It simply declares that certain property is appellant's separate property and certain other property is respondent's separate property. That is ineffective to establish the nature of those assets.

In particular, with respect to nontitle property, such as the stock holdings that the Agreement characterizes as appellant's separate property (see, e.g., *In re Marriage of Jafeman* (1972) 29 Cal.App.3d 244, 260), the presumption that the assets are community property can be rebutted only by tracing the source of funds used to acquire the assets (*In re Marriage of Buol* (1985) 39 Cal.3d 751, 762). As the Agreement contains no evidence of the source of the funds used to acquire any particular asset within the preceding nine years of marriage, the funds must be presumed to have been community property.[6] Accordingly, the Agreement is plainly an agreement to transmute community property to separate property.

Appellant asserts the Agreement was not a transmutation agreement, but was instead "a valid postnuptial agreement, which separated the couple's then-existing and future finances." It is readily apparent that the distinction appellant attempts to draw is completely artificial. What is a transmutation agreement if it is not an agreement to

[6] We note further that appellant conceded as much in his trial brief when he stated: "In fact, *the then community estate* was divided equally between the parties." (Italics added.) Additionally, during the hearing before the trial court, appellant's attorney (who is also representing him in this appeal) agreed with the court's statement that, but for the agreement, the property listed in the two attached schedules would have been all community property. While extrinsic evidence may not be relied on in interpreting a transmutation agreement, appellant's admissions are difficult to ignore. (*Starkman, supra,* 129 Cal.App.4th 659, 664.)

"separate" a married couple's "then-existing and future finances"? Further, how can a transmutation agreement, which, by definition is entered into after marriage, be classified as anything other than a "postnuptial agreement"?

Appellant relies primarily on two cases in support of his argument: *In re Marriage of Burkle* (2006) 139 Cal.App.4th 712 (*Burkle*) and *In re Marriage of Friedman* (2002) 100 Cal.App.4th 65 (*Friedman*). Based on these cases, he claims that postnuptial agreements can never be classified as transmutation agreements. We are not persuaded.

In *Friedman,* a man who had recently been diagnosed with leukemia contacted an attorney four days after his wedding in order to prepare an agreement to protect his new wife from creditors in the event he did not survive cancer treatments. (*Friedman, supra,* 100 Cal.App.4th 65, 68.) The principle issue in the case was whether the agreement was invalid because the attorney who prepared it had not obtained a written conflict of interest waiver as required by the State Bar Rules of Professional Conduct, rule 3-310(C). (*Friedman, supra,* at pp. 69–70.) As the parties had been married less than two months when they signed the agreement, it is exceedingly unlikely that they had accumulated any community property. Accordingly, it is not surprising that the appellate court never reached the issue of whether the postnuptial agreement amounted to a transmutation.

In *Burkle,* the parties, after having been separated and near divorce, reached an agreement regarding their finances and resumed their relationship for several years before the wife ultimately filed for divorce. (*Burkle,* 139 Cal.App.4th 712, 718.) For a number of reasons, she claimed that the agreement was void. The fact that the appellate court did not address section 852, however, does not persuade us that the statute has no application to postnuptial agreements. It may be that the agreement, which, in part, did appear to transmute community property to the wife's separate property (*id.* at p. 719), was drafted in compliance with section 852. If so, the parties would have had no need to address the statute in their arguments. In any event, *Burkle* is silent on the issue and therefore does not stand for the proposition that the statutes regarding transmutation can never apply to postnuptial agreements. (See *Vasquez v. State of California* (2008) 45 Cal.4th 243, 254 [" ' "[i]t is axiomatic that cases are not authority for propositions not considered." '

[Citations.]"].) In sum, we reject appellant's argument that postnuptial agreements fall outside the scope of section 852.

III. Does the Agreement Comply with Section 852?

Appellant claims that if the Agreement is deemed a transmutation agreement, it nevertheless complies with section 852. We disagree.

The determination of the writing's proper interpretation is subject to our independent review. (*In re Marriage of Barneson* (1999) 69 Cal.App.4th 583, 588 (*Barneson*).)[7]

The statutory scheme that governs transactions between spouses who "transmute" or change the character of property during an ongoing marriage imposes strict requirements in order for a transmutation to be effective. (§§ 850–853; see also *In re Marriage of Benson* (2005) 36 Cal.4th 1096, 1103 (*Benson*).) Specifically, as noted above, section 852, subdivision (a), provides that "A transmutation of real or personal property is not valid unless made in writing *by an express declaration* that is made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected." (Italics added.)

"An 'express declaration' does not require use of the terms 'transmutation,' 'community property,' 'separate property,' or a particular locution. [Citation.] For example, the language 'I give to the account holder any interest I have in the funds deposited in this account,' is sufficient to establish transmutation. [Citation.] The express declaration must unambiguously indicate a change in character or ownership of property. [Citation.] A party does not 'slip into a transmutation by accident.' [Citation.]" (*Starkman, supra,* 129 Cal.App.4th 659, 664.)

As explained in *Estate of MacDonald* (1990) 51 Cal.3d 262, 272 (*MacDonald*), "a writing signed by the adversely affected spouse is not an 'express declaration' for the purposes of [former Civil Code] section 5110.730 (a) [now section 852, subdivision (a)]

[7] We observe appellant spends much of his brief attacking the trial court's statement of decision. As we are reviewing the Agreement de novo, the alleged flaws in the statement of decision are not material to our analysis.

unless it contains language which expressly states that the characterization or ownership of the property is being changed." (Italics omitted.) More recently, in *Benson, supra,* the Supreme Court confirmed *MacDonald's* holding. (*Benson, supra,* 36 Cal.4th 1096, 1107 [under *MacDonald,* a valid transmutation "necessitates not only a writing, but a special kind of writing, i.e., one in which the adversely affected spouse expresses a clear understanding that the document changes the character or ownership of specific property"); see also *Barneson, supra,* 69 Cal.App.4th 583, 588.) "The determination whether the language of a writing purporting to transmute property meets the *MacDonald* test must be made by reference to the writing itself, without resort to parol evidence." (*Barneson, supra,* at p. 588; see also *Benson, supra,* at p. 1106 ["the writing must reflect a transmutation on its face, and must eliminate the need to consider other evidence in divining this intent"].)

In *MacDonald, supra,* the court determined that a wife's signature on IRA agreements establishing her consent to the designation of the husband's trust as sole beneficiary of the accounts was not an "express declaration" that the wife intended to transmute her community share of the funds in the accounts into the husband's separate property. The court reached this conclusion despite the existence of a great deal of extrinsic evidence that the spouses intended to divide all of their community property into separate property shares after learning that the wife was terminally ill. (*MacDonald,* 51 Cal.3d 262, 267–268.)

In interpreting the phrase "express declaration," the *MacDonald* court held that in order to constitute such a declaration, the IRA documents would have had to include language "expressly stating that [the wife] was effecting a change in the character or ownership" of community property. (*MacDonald, supra,* 51 Cal.3d 262, 273.) Because there was nothing that indicated that the wife knew "the legal effect of her signature might be to alter the character or ownership of her interest in the pension funds," her signature consenting to the designation of her husband's trust as the sole beneficiary was insufficient to alter the character of the property. (*Id.* at pp. 272–273.)

Appellant contends the Agreement establishes that respondent knew she had "divided their then-existing property into two specified lists," and also argues that she is estopped from denying her stipulation at trial (more than 10 years after she signed the Agreement) that all the assets on the schedules had previously been community property. Our reading of the Agreement convinces us that it contains no language expressly stating that the characterization or ownership of existing property is being changed. Each spouse is given a share of existing property as his or her "separate property" but there is no acknowledgment that the existing property had ever been characterized as community property. There is simply no "express declaration" that respondent intended to transmute her share of community property into separate property. Lacking language indicating that the parties intended to effect such a change, the agreement is ineffective to transmute the character of property acquired during marriage and before execution of the agreement. Accordingly, we agree with the trial court that the document does not satisfy section 852 and therefore has no legal force.

IV. After-acquired Assets

Appellant clams that even if the Agreement is deemed an ineffective transmutation of the existing assets, it would still be effective as a postnuptial agreement with respect to assets accumulated after August 8, 1997, the date on which it was signed. Specifically, he claims a section of the Agreement providing that "All other property received or acquired during the marriage by [each party] from whatever source shall be and remain the separate property of [that party]" remains viable. Respondent counters that appellant did not contend in the trial court that any portion of the Agreement is severable and enforceable.

Appellant's opening brief does not cite to any authority in support of the proposition that portions of a postnuptial agreement can be severed from an otherwise unenforceable agreement. Every argument presented by an appellant must be supported by both coherent argument and pertinent legal authority. (*Berger v. California Ins. Guarantee Assn.* (2005) 128 Cal.App.4th 989, 1007.) If either is not provided, the appellate court may treat the issue as waived. (*Ibid.*)

Additionally, we agree with respondent that this point was not raised below. Issues that are not raised in the trial court may be deemed waived on appeal. " ' "An appellate court will ordinarily not consider procedural defects or erroneous rulings, in connection with relief sought or defenses asserted, where an objection could have been, but was not, presented to the lower court by some appropriate method . . . ." ' [Citation.] ' "The purpose of the general doctrine of waiver is to encourage a defendant to bring errors to the attention of the trial court, so that they may be corrected or avoided and a fair trial had . . . ." ' [Citation.]" (*People v. Saunders* (1993) 5 Cal.4th 580, 589–590.) In sum, we deem the issue waived.

DISPOSITION

The judgment is affirmed.

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Graham, J.*

We concur:

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Marchiano, P. J.

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Margulies, J.

* Retired judge of the Superior Court of Marin County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.